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ORIGINAL

May 15, 2003

RECEIVED

MAY 15 2003

Federal Communications Commission
Office of Secretary

VIA HAND DELIVERY

Marlene H. Dortch, Esquire
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Notification of Ex Parte Communication
MB Docket No. 02-277, MM Docket Nos. 01-235, 01-317, and 00-244

Dear Ms. Dortch:

This is to advise you, in accordance with Section 1.1206 of the FCC's rules, that on May 14, 2003, Barry Drake, President of Backyard Broadcasting Holdings, LLC ("Backyard Broadcasting"), Anne Swanson of this office, and I met with Simon Wilkie, Chief Economist of the Commission, and Jonathan Levy, Deputy Economist, of the Commission's Office of Strategic Planning and Policy Analysis, to discuss Backyard Broadcasting's concern that any revision of the definition of radio markets, particularly a reformulation based on geographic or economic data, such as Arbitron's Radio Metro Markets data, would competitively disadvantage small, recently established companies vis-à-vis larger and more entrenched radio owners. If the FCC nonetheless adopts such a change, Backyard Broadcasting stressed the importance of grandfathering and allowing free transferability of any non-compliant clusters and of giving all participants in a market the ability to increase station ownership to the level of the largest grandfathered cluster.

In addition, if the Commission should adopt a geographic or economic market definition, Backyard urged that the Commission also provide that same-service, in-market stations without substantial overlap be treated as a single station for computing a licensee's ownership limitation. This exception would reflect the reality that later entrants to a market may have to combine several Class A FM stations serving different areas to obtain the geographic coverage area of a single Class C FM station. The Commission's existing same-service simulcast rule (47 C.F.R. § 73.3556) could provide an appropriate standard for determining whether overlap of principal community contours is "substantial."

The enclosed handouts were distributed at the meeting.

As required by section 1.1206(b), two copies of this letter are being submitted for each of the above-referenced dockets.

Very truly yours,

John S. Logan

Enclosures

cc (w/o enc.) by telecopy: Dr. Simon Wilkie
Dr. Jonathan D. Levy

The Substitution of Arbitron Metro Data To Govern Local Market Definition Will Hamstring Small and Medium-Size Group Owners Seeking To Compete Effectively with Mega-Groups in Local Markets

MM Docket Nos. 00-244, 01-235, 01-317
MB Docket No. 02-277

Backyard Broadcasting is a small, recently established independent company, dedicated to local radio, with a total of 22 radio broadcast stations in the Muncie, Indiana (Arbitron Metro Rank 201), Olean, New York (Arbitron Metro Rank 207), Elmira-Corning, New York (Arbitron Metro Rank 213), Williamsport, Pennsylvania (Arbitron Metro Rank 259), and Jackson, Mississippi (Arbitron Metro Rank 123), markets.

- To compete effectively against mega-owners who can spread their risks over scores of markets, small group owners like Backyard need the ability to cluster stations pursuant to the same rules under which the mega-consolidators have already built their businesses.
  - Despite its relatively limited resources, Backyard directly competes with some of the largest consolidators, including Clear Channel in the Jackson, Mississippi, and Williamsport, Pennsylvania, markets, Infinity, Entercom, and Citadel in the Olean, New York, market, and Citadel in the Muncie, Indiana, market.
  - Operating under the existing rules and market definitions, these mega-consolidators were able to establish effective and efficient clusters of stations in various markets, spreading fixed costs among stations within a market and risk among stations in several markets.
  - Recent entrants like Backyard must be afforded a level playing field as they try to grow and compete against such already large and dominant competitors. This means allowing new entrants the same opportunities to create viable station groups capable of competing with the established dominant groups.
- The use of Arbitron Metro Market data, particularly in smaller markets, imposes a far more restrictive standard than existing rules and would stymie new entrants seeking to compete effectively against entrenched mega-consolidators and their existing clusters.
  - The Commission recently reviewed and approved Backyard's acquisition of control of several stations in the Muncie, Indiana, area. Backyard's holdings, however, could exceed the ownership rules if Arbitron Metro Market data is used to determine the size of the market. Arbitron assigned just 12 stations to the newly-created Muncie - Marion, Indiana, Metro Market. Although the ownership rules allow common ownership of just 3 FM stations and 5 stations overall in a 12 station market, Backyard already holds 6 stations in the defined market, including 5 FM stations.
  - Defining smaller markets involves a great deal of discretionary line drawing. In the absence of a single large city, one must pick and choose among groups of smaller communities to form new markets. If such choices are made arbitrarily and without

reference to existing and potential competition, the formation of new markets could have an immediate and devastating effect on smaller group owners. For this reason, the Commission must not extend the use of Arbitron Metro Market definitions to smaller markets without careful consideration of the effects on such markets.

  - To the extent the use of Arbitron Metro Market definitions would create more restrictive standards in smaller markets, such acts would be reregulatory and contrary to the intent of Section 202(h) of the Telecommunications Act of 1996 and the presumption in favor of repeal that courts have found must be applied in construing its provisions.

- More restrictive markets created by the use of Arbitron Metro Market data could force station divestiture or the breakup of existing clusters.

  - For smaller group owners to be able to maintain value, they must have the ability to keep existing clusters intact.

  - Forcing the divestiture of stations from an existing cluster would have a devastating and immediate effect on a smaller group owner by causing a precipitous loss of market value for its properties and an inability to obtain loan capital.

  - Moreover, unless existing clusters may be transferred or assigned, small group owners will lose much of the market value of their stations because prospective buyers will not be able to realize the benefits of existing clusters. Most smaller growing companies likely will need to restructure to secure financing, change ownership in initial public offerings and, potentially, merge with other comparably sized companies if thy are to grow into effective competitors. The mega-owners already have passed through that stage of development. Under more restrictive market definitions, even a simple corporate restructuring, IPO or other change of control could force the break up of clusters, destroying much of the value of smaller companies like Backyard and precluding them from becoming effective competitors against the mega-owners.

  - At the same time, more restrictive market definitions, combined with transfer/assignment protections for existing clusters (*i.e.*, "grandfathered clusters"), would simply lock-in the current patterns of market dominance while blocking the development of potentially competitive new clusters.

- Arbitron is a public company accountable to its shareholders and to its largest customers, which are the entrenched mega-consolidators. The economic incentives guiding Arbitron's decisions do not necessarily align with the public interest benefits that the Commission seeks to realize in this proceeding. Use of Arbitron market definitions, which the company may vary from time to time, would mean that the value of market clusters of emerging competitors may become a function of Arbitron's commercial interests.

- For instance, in 1987, Arbitron lowered its estimate of the Black population in the Houston, Texas, market after certain major station owners petitioned for such changes. Radio station KMJQ(FM), which concentrated on Black listeners, lost market share as a result. In response, KMJQ(FM) submitted population reports from the City of Houston Department of Planning and Development, which were endorsed by the city of Houston and Harris County. Arbitron refused to revise its estimates, however, or even postpone the implementation of the lower estimates pending further studies. (*See KMJQ, KMJM Drop Arbitron*, Radio and Records, Jan. 13, 1988, at 3, attached hereto.) Similarly, Spanish language broadcasters have criticized Arbitron' failure to take accurate account of language preference, which undermines the Hispanic radio industry by giving a false measure of the listening habits of Spanish-language listeners.

Conclusions:

- *Only Fix What Is Broken.* The Commission should not disrupt the market by drastically altering radio market definitions. Although the current rules create certain inconsistencies and discrepancies that should be addressed (*e.g.*, the "Pine Bluff" problem), radical changes are unnecessary and not in the public interest --- particularly where such changes will tighten existing restrictions.

- *Arbitron Is Not The Answer.* Use of Arbitron Metro Market Data will lead to arbitrary market definitions that may not reflect competitive realities. In particular, Arbitron Metro Market data must not be used in markets smaller than the Top 200 because the impact will be arbitrary and inconsistent. Moreover, adopting more restrictive Arbitron Metro Markets will only disrupt the efforts of emerging small companies that should be encouraged as effective competitors to the mega-consolidators.

Attachment

ISSUE NUMBER 718 THE INDUSTRY'S NEWSPAPER JANUARY 1, 1988

R&R RADIO & RECORDS

KMJQ, KMJM Drop Arbitron

MSI's Houston Black Population At Issue

KMJQ/Houston and sister Urban KMJM/St. Louis will not renew their Arbitron subscriptions following a decision by Arbitron's population data supplier Market Statistics, Inc. (MSI) to stand behind a lower estimate of Harris County (Houston)'s black population.

According to a KMJQ statement, two Houston competitors, Viacom Country outlet KIKK and Group W's Beautiful Music KODA, "petitioned Arbitron to lower its estimates of Houston's black population. Pressure by these two major broadcast groups led to an announcement in August [1987] that Arbitron would lower the black population estimates" in the fall '87 report.

Amplifying the sequence of events, Arbitron VP Rhody Bosley said KIKK and KODA petitioned MSI to lower the estimate on the basis of new 1987 data from the Texas Department of Health. KMJQ contends that data actually stemmed from a 1984 survey. MSI officials were unavailable for comment.

KMJQ Survey "Not Considered"

KMJQ protested the new lower estimate, and at a meeting with Arbitron and MSI officials, presented a population report from Houston's Dept. of Planning & Development, endorsed by the city of Houston and Harris County. This data, KMJQ states, "showed the black population to be greater than the MSI estimates and is information more current than any MSI has been using."

Arbitron turned the decision over to MSI, which wrote KMJQ that it was satisfied with its estimates and would not take into consideration the new data KMJQ had submit-

KMJQ/See Page 21

KMJQ

Continued from Page 3

ted. According to Bosley, MSI felt it was unable to validate the new survey's numbers. "In any kind of research, there's some kind of lag period," Bosley added.

KMJQ states that Arbitron refused to postpone the implementation of the new lower estimates pending further studies. Sr. VP/GM Barry Drake commented, "When the burden of proof was placed on our shoulders, we responded by furnishing the most accurate, up-to-the-minute data available. Obviously, Arbitron could not face those other stations and reverse their decision to lower the black population. This is a sad day for our industry."

In response, Bosley emphasized that the decision was MSI's, stating, "We accept the data that MSI supplies, so we'll [stick with it]." He pointed out that MSI supplies population data not only to Arbitron in all markets, but to Birch and two other major research organizations. Bosley also said the lower black population estimate was calculated to affect KMJQ's 12+ share by at most a tenth of a point, and expressed disappointment at KMJQ and KMJM's decision.

KMJQ MAJIC 102 FM

Keymarket Communications

P.O. Box 22900 Houston, Texas 77227 713/623-0102

Backyard Broadcasting Holdings, LLC Stations
(by Arbitron Market)

Jackson, Mississippi (Arbitron Metro Rank 123)

Licensee: Backyard Broadcasting Mississippi, LLC
WTYX(FM), Jackson, Mississippi
WRXW(FM), Pearl, Mississippi

Muncie-Marion, Indiana (Arbitron Metro Rank 201),

Licensee: Indiana SabreCom, Inc.[1]
WHTY(FM), Hartford City, Indiana
WHTI(FM), Alexandria, Indiana
WURK(FM), Elwood, Indiana
WERK(FM), Muncie, Indiana

Licensee: Muncie SabreCom, Inc.
WXFN(AM), Muncie, Indiana
WLBC-FM, Muncie, Indiana

Olean, New York (Arbitron Metro Rank 207),

Licensee: Arrow Communications of N.Y., Inc.
WPIG(FM), Olean, New York
WHDL(AM), Olean, New York

Elmira-Corning, New York (Arbitron Metro Rank 213)

Licensee: Chemung County Radio, Inc.
WNKI(FM), Corning, New York
WPGI(FM), Horseheads, New York
WNGZ(FM), Montour Falls, New York
WWLZ(AM), Horseheads, New York
WGMF(AM), Watkins Glen, New York

Williamsport, Pennsylvania (Arbitron Metro Rank 259)

Licensee: South Williamsport SabreCom, Inc.
WILQ(FM), Williamsport, Pennsylvania
WWPA(AM), Williamsport, Pennsylvania
WBZD-FM, Muncy, Pennsylvania
WZXR(FM), S. Williamsport, Pennsylvania
WCXR(FM), Lewisburg, Pennsylvania
WRVH(FM), Williamsport, Pennsylvania

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[1] Indiana SabreCom, Inc. station WHBU(AM), Anderson, Indiana, is not included in the Muncie-Marion, Indiana, Arbitron Metro Market.

Replacing the Current Radio Market Definition with an Arbitron/BIA Standard Will Frustrate the Efforts of Small and Medium-Sized Group Owners to Compete Effectively with Mega-Groups in Local Markets

- The Commission should not disrupt the radio industry by drastically altering radio market definitions based on Arbitron and/or BIA standards.
  - The industry has adapted to the current radio market definition, and those entities that entered the market since 1996 have based their competitive strategies on the existing definition.
  - These new entrants and other growing companies must have the opportunity to develop efficient clusters of stations under the same rules that have been used to build the existing mega-companies. Otherwise, the new entrants will not have any opportunity to compete effectively with them.
  - Disruption in the industry from a new radio market definition will disproportionately harm smaller players for whom the loss or inability to transfer intact even a single cluster could have a devastating effect. Mega-owners can spread the risk of a major change across one or more of their markets; smaller owners seeking to compete with them cannot.
- If the Commission nevertheless changes the radio market definition to an Arbitron and/or BIA standard, the Commission must adopt provisions that limit the harm that smaller group owners will suffer:
  - The Commission should provide for full grandfathering and full transferability of clusters.
    - A requirement for divestiture of clusters would severely and disproportionately harm smaller group owners; mega-owners can spread the risk.
    - Any limitation on transferability of clusters would result in an immediate loss of value that would be felt most acutely by small group owners. Mega-owners reached their current positions through a history of transfers and assignments, including numerous "trade up" sales and exchanges, initial public offerings, mergers, and the addition of new equity investors. If the Commission only permits a limited number of transfers of grandfathered clusters, it will cut off the only growth path for those seeking to offer effective competition to mega-owners.
  - The Commission should allow any owner in a market to increase station ownership to the level of the largest grandfathered cluster. *Otherwise, the new rules effectively will protect entrenched mega-owners against effective competition.*
  - Stations in a market that do not have any contour overlap with another co-owned station in the market -- or have so little contour overlap that the Commission's rules would permit same-service simulcasting -- should be treated as one station in the numerator in computing the ownership limit for that licensee. Otherwise, a new entrant's two non-overlapping Class A stations would be treated the same as an entrenched owner's overlapping Class C stations.
  - FCC should deal with anomalies under the current market definition standard on a case-by-case basis. For example, the so-called "Pine Bluff" problem could be addressed by requiring that the requisite market size be established without counting in the denominator commonly-owned stations that are not a part of the cluster being evaluated.